UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

WILLIAM G. LOTT, Petitioner, v. U.S. DEPARTMENT OF LABOR, DEEOIC, Respondent.	3:11-cv-00258-ECR-RAM **Order**

This case arises out of a petition for judicial review (#1) of a Decision and Order of the Final Adjudication Branch, U.S. Department of Labor, DEEOIC ("DOL") denying Petitioner's eligibility for certain wage-loss benefits under Part E of the Energy Employees Occupational Illness Compensation Program Act, 42 U.S.C. § 7384 et seq. ("EEOICPA"). Now pending before the Court is Respondent DOL's motion to dismiss (#2). The motion is ripe and we now rule on it.

I. Background

In the mid-1960s, Petitioner worked in uranium mines in Colorado for two years. (Pet. at 1 (#1).) At the time, Petitioner was falsely told that the mines were safe. (Id.) In 2000, as a result of numerous illnesses and injuries suffered by workers in the uranium mines, Congress passed the EEOICPA. Petitioner was awarded

benefits under the EEOICPA but was denied his third claim for wage loss under Section E of the EEOCIPA. (Id. at 2.)

On January 30, 2006, Petitioner file a claim with the DOL for wage loss under Section E of the EEOICPA. (Id.) Respondent held a hearing on the claim on November 17, 2010, and issued a denial on February 11, 2011, which Petitioner now appeals. (Id.)

Petitioner filed a petition for judicial review (#1) in this Court on April 11, 2011. On September 7, 2011, Respondent filed a motion to dismiss (#2) pursuant to Federal Rules of Civil Procedure 12(b)(4) and 12(b)(5). Petitioner responded (#4) on September 20, 2011, and Respondent replied (#5) on September 26, 2011.

On October 19, 2011, we issued a notice of intent to dismiss (#6) pursuant to Federal Rule 4(m). On October 20, 2011, Petitioner submitted a certificate of service (#7), indicating that Petitioner mailed a copy of the petition (#1) to Respondent via U.S. Mail on August 4, 2011, within the 120-day period prescribed by Rule 4(m).

II. Legal Standard

Federal Rules of Civil Procedure 12(b)(4) and 12(b)(5) permit a party to challenge the form of summons and the method of service attempted by the other party, respectively. "Federal Rule of Civil Procedure 4 governs service of process in federal district court." Brockmeyer v. May, 383 F.3d 798, 800 (9th Cir. 2004). Once a party challenges the sufficiency of service, the non-moving party bears the burden of establishing that service was valid under Rule 4. Id. at 801 (citations omitted).

III. Discussion

Respondent argues that dismissal for insufficient process is proper under Rule 12(b)(4) because Petitioner has never obtained issuance of a summons. Respondent further argues that dismissal for insufficient service of process is warranted under Rule 12(b)(5) because petitioner has not served the U.S. Attorney's office or the U.S. Attorney General as required by Rule 4(i), which governs service of process on United States agencies. Petitioner does not dispute that he has never obtained or served Respondent with a summons in this case, nor that he did not serve the U.S. Attorney General or the District Attorney. Rather, Petitioner argues that Rule 4 does not apply to a petition for review because it is not a complaint, and further, that he has met all the requirements for service set forth in the EEOICPA at 42 U.S.C. § 7385s-6.

Petitioner's argument that the Federal Rules do not apply to this action because it was initiated through the filing of a "petition for review" rather than a "complaint" is unavailing. Rule 1 provides that "[t]hese rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81." See also FED. R. CIV. P. 2 ("There is one form of action - the civil action."). This is not one of those proceedings specified in Rule 81 as exempt from the Federal Rules. See FED. R. CIV. P. 81. Accordingly, the federal rules apply to this action in federal court by definition. This interpretation is confirmed by the numerous federal courts applying the Federal Rules of Civil Procedure to actions, such as this one, seeking review of

an agency decision, including those petitions filed pursuant to the EEOICPA. See, e.g., Jordan v. U.S. Dep't of Labor, 352 F.App'x 187, 189 (9th Cir. 2009) (affirming district court's grant of summary judgment pursuant to Rule 56 in favor of DOL on petitioner's appeal of DOL's decision under the EEOICPA); Barrie v. U.S. Dep't of Labor, 805 F.Supp.2d 1140, 1144 (D.Colo. 2011) (granting respondent's 12(b)(1) motion to dismiss petitioner's action seeking review of DOL's denial of his wage-loss claim under part E of the EEOICPA); Harger v. U.S. Dep't of Labor, No. CV-06-5071-RHW, 2011 WL 534359, at *1-2 (E.D.Wash. Feb. 8, 2011) (denying defendant DOL's motion to dismiss plaintiff's EEOICPA claim under Rule 12(b)(6)); Willingham v. Dep't of Labor, 475 F.Supp.2d 607, 611-12 (granting DOL summary judgment pursuant to Rule 56 on plaintiff's claim seeking review of DOL's denial of her claim arising under the EEOICPA); see also S.J. v. Issaquah Sch. Dist. No. 411, 470 F.3d 1288, 1292 ("While we have recognized that an IDEA action resembles an administrative appeal for purposes of selecting the most analogous state statute of limitations, . . . we have never suggested that such actions are not 'civil actions' governed by the Federal Rules of Civil Procedure. . . . There is no basis for concluding that IDEA actions are not 'of a civil nature' simply because they have an appellate flavor in some respects.").

While Part E of the EEOICPA provides a procedure for appealing a decision by the DOL, it does not purport to supplant the Federal Rules as they apply in federal court:

> A person adversely affected by a final decision of the Secretary [of Labor] may review that order in the United

> States district court . . . by filing in such court within 60 days after the date on which that final decision was issued a written petition praying that such decision be modified or set aside. The person shall also provide a copy of the petition to the Secretary. Upon such filing, the court shall have jurisdiction over the proceeding and shall have the power to affirm, modify, or set aside, in whole or in part, such decision.

42 U.S.C. § 7385s-6(a). Upon its face, the statute does not seek to supplant the federal rules, but rather provides a method for conferring jurisdiction upon a federal court, rather than prescribing rule of procedure once the action commences in federal court. Specifically, the provision requiring petitioners to provide the Secretary of Labor with a copy of the petition does not state or imply that such action constitutes service of process, nor that the Federal Rules do not apply. Again, the numerous federal courts applying the Federal Rules to actions such as this one confirm this interpretation.

Rule 4(i) governs service of process on United States agencies. "To serve a United States agency . . . , a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency." FED. R. CIV. P. 4(i)(2). In order to serve the United States, a party must:

> (A) (i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought - or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk - or
>
> (ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office;

> (B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C.; and
>
> (C) if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.

FED. R. CIV. P. 4(i)(1). In sum, a party seeking to serve a United States agency must send a copy of the summons and of the complaint by registered or certified mail to the agency, to the relevant United States attorney, and to the United States Attorney General in Washington, D.C.

As noted above, once one party challenges the sufficiency of service, the burden shifts to the non-moving party to establish that service was proper under Rule 4. Petitioner does not dispute that he did not obtain a summons, nor has Petitioner established that he served a summons on any party, as required by Rule 4(i). Accordingly, dismissal for insufficient process is warranted under Rule 12(b)(4). Additionally, Petitioner does not dispute that he did not serve a copy of the petition and a summons upon the United States district attorney for the District of Nevada, nor did Petitioner serve the United States Attorney General, as is also required by Rule 4(i). Accordingly, dismissal for insufficient service of process is also proper under Rule 12(b)(5).

IV. Conclusion

The Federal Rules of Civil Procedure apply to this civil action in federal court by definition. For this reason, federal courts apply the Federal Rules to actions such as this one seeking review

of a decision by the Department of Labor denying claims brought pursuant to the EEOICPA. Petitioner does not dispute that he did not comply with Rule 4, governing service of process. Accordingly, the action must be dismissed for insufficient process and service of process upon a United States agency under Rule 4(i).

IT IS, THEREFORE, HEREBY ORDERED that Respondent's motion to dismiss (#2) is **GRANTED**.

The Clerk shall enter judgment accordingly.

DATED: April 12, 2012.

Edward C. Reed.
UNITED STATES DISTRICT JUDGE